DIVORCE RECOGNITION—A TWO HEADED MONSTER: FULL FAITH AND CREDIT AND DUE PROCESS

I. INTRODUCTION

The law of recognition of interstate divorce is dominated by nineteenth century concepts of an agriculturally oriented, immobile society that attached a certain stigma to the breaking up of the family unit through divorce. Society has liberalized its attitude toward divorce in this century, believing that the law should not force people to live together against their will under tensions often more damaging to children than actual separation of the parents. The twentieth century has also fostered a mobile society where people are capable of changing residences a thousand miles in a matter of hours. Thus separation of the spouses into different states preceding divorce is not an uncommon occurrence, nor is the practice of leaving the state of matrimonial domicil to obtain a divorce due to the limited grounds available in that state. Often divorces procured in this situation are *ex parte* in nature, the absent spouse being notified by mail or by publicaion. In other cases, by prior agreement of the parties the absent spouse retains an attorney in the forum state to enter an appearance and admit allegations as to the complaining spouse's domicil and often to admit the grounds for divorce. Against this background, Mr. Justice Frankfurter commented on the usual situation in the divorce court where the parties and their attorneys engage in conduct that "in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it."[1]

The breaking up of the marriage of two people often has ramifications far exceeding the marital status of the spouses. Children are affected, as are property rights and future heirs. As with any situation that affects the well-being of its residents, the state of matrimonial domicil is deeply concerned with an orderly marital termination that to some extent permanently settles the rights and duties of the parties. Uncertainty in recognition of the dissolution of a marriage upsets the interest of the state and can have the effect of illegitimatizing children, causing annulment of subsequent marriages, and causing problems in the distribution of property upon the death of one of the parties.

A not totally unrealistic hypothetical situation will serve to

1 Sherrer v. Sherrer, 334 U.S. 343, 367 (1948) (dissenting opinion).

focus the issues. *H* and *W* were happily married residents of State *A* for ten years. They had two children and *H* had been successful in acquiring a substantial estate. For a variety of reasons, the marital relationship deteriorated to a point where *H* and *W* saw that no useful purpose would be served by continuing to live together. *H* went to an attorney and was told that there were no grounds for divorce in State *A* but that State *B* had very liberal divorce laws and that he should have no trouble procuring a divorce there. *H* traveled to State *B*, resided there for the necessary period, filed for divorce and had *W* served by mail. *W* was perfectly willing to let *H* obtain a divorce, since they had previously agreed to a divorce and had worked out a property settlement agreeable to both, and did not enter an appearance. *H* obtained the divorce uncontested and returned to State *A* whereupon he immediately married *D*. *H* and *D* had one child before *H* died without executing a will. *W*, finding her property settlement to be less attractive upon learning the extent of *H's* estate, brought an action to have *H's* second marriage declared null and void and also to have *H* and *W's* marriage declared to be still existent since *H* had never established a domicil in State *B* and therefore the purported divorce was of no validity in State *A*.

The competing interests in the above situation are not easily measured. State *A* has an interest in preserving the integrity of the marital status of its domiciliaries. The marriage of *H* and *W* and *H* and *D* were solemnized in State *A*; therefore, by general principles of conflicts of law, the validity of each marriage is determined by the law of State *A*.[2] State *A* was also the domicil of *H*, and therefore the law of State *A* will determine the ultimate distribution of *H's* estate.

Competing against State *A's* interest in protecting its domiciliaries from having their marital status determined by an *ex parte* divorce procured in a sister state is the interest of all states in protecting the integrity of judgments rendered in one state from collateral attack in another state. Also competing against the interest of State *A* is the desire to achieve certainty and finality in divorce cases so as to avoid the situation described above. Once the legal status of the parties has been finalized in one state, the parties should feel secure and free to remarry in another state. Any solution to the problem must take into account these factors.

A solution to the problem of the extra-territorial effect of

2 H. GOODRICH, CONFLICT OF LAWS 228 (4th ed. Scoles 1964).

divorce must also meet the requirements of the United States Constitution. The Constitution requires that "Full faith and Credit in each State shall be given to the Public Acts, Records, and Judicial Proceedings of every other State."[3] The due process clause of the Constitution requires the forum state to have jurisdiction of the subject mater in order for its judgments to have validity outside as well as within the forum state. Further, due process requires contacts with the forum state in order to validly bind a defendant who is not personally served in the state and who otherwise does not voluntarily enter a general appearance.

II. The Beginning—The Williams Cases

Mr. Williams and Mrs. Hendrix were both resident domiciliaries of North Carolina. They left their spouses and went to Nevada where they resided for the necessary six weeks and procured *ex parte* divorces against their absent consorts, based upon constructive service. A decree of divorce was granted to both parties, the court finding in each case

> [T]he plaintiff has been and now is a *bona fide* and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceeding the commencement of this action in the manner prescribed by law.[4]

Immediately thereafter, Mr. Williams and Mrs. Hendrix married each other in Nevada and returned to live together in North Carolina. Soon they were indicted on a charge of bigamous cohabitation, and both pleaded not guilty. As a defense, they offered in evidence copies of the Nevada proceedings and claimed that the divorce decrees and marriage in Nevada were valid in North Carolina. They were convicted, and the judgment of conviction was affirmed by the Supreme Court of North Carolina.[5] The state contended that since neither of the original spouses were served in Nevada, nor entered an appearance therein, the Nevada decree would not be recognized in North Carolina. The state also contended that the defendants had gone to Nevada for the sole purpose of obtaining a divorce, not to establish a bona fide residence. For these reasons, the Supreme Court of North Carolina held that North Carolina was not required to recognize the Nevada decree under

3 U.S. Const. art. IV, § 1.

4 Williams v. North Carolina, 317 U.S. 287, 290 (1942).

5 220 N.C. 455, 17 S.E.2d 769 (1941).

the full faith and credit clause of the constitution. On certiorari to the Supreme Court of the United States, the conviction was reversed and remanded.[6]

The decision in the first *William* case represented a major change in the law applicable to the recognition of out-of-state divorces. The decision reflected a change in attitude on the part of the Court as to the interests that should be protected when determining the validity of a divorce procured in one state against a domiciliary of another state. Prior to the first *Williams* case, the Supreme Court had primarily concerned itself with the interest of the states in protecting their domiciliaries against *ex parte* divorces obtained in another state. The Court was less concerned with the possibility that a person might be validly divorced in one state, yet remain legally married in another state. In *Haddock v. Haddock*[7] the Supreme Court had held that a state is not required to give full faith and credit to a divorce upon constructive service rendered in another state unless the forum state was both the domicil of one of the parties and also the matrimonial domicil of the marriage, or unless the forum state's decision was based upon personal service on the non-resident spouse. Previous to the *Haddock* case, the Supreme Court had held that a decree in favor of a party in his domicil, which was also the domicil of the other spouse until the time of separation, was entitled to full faith and credit, at least when the facts negatived the right of the defendant spouse to acquire a separate domicil.[8] This was true despite the facts that the decree was rendered upon constructive or substituted service and the absent spouse made no appearance. Thus the court had adopted what became known as the "fault doctrine," that is, a divorce obtained by constructive or substituted service was not entitled to full faith and credit when the party "at fault" obtained a divorce outside the matrimonial domicil despite a finding that the party obtaining the divorce was domiciled in the state rendering the decree.

The *Haddock* case created much uncertainty as to whether a divorce obtained in one state would be entitled to full faith and credit and reflected an attitude on the part of the Supreme Court to

6 Williams v. North Carolina, 317 U.S. 287 (1942) [hereinafter referred to in text as the first Williams case].

7 201 U.S. 562 (1906).

8 Atherton v. Atherton, 181 U.S. 155 (1901). The court of appeals of New York had affirmed a divorce brought by the wife, refusing to recognize a decree of divorce obtained by the husband in Kentucky upon constructive service, despite a finding in the New York court that Kentucky was the matrimonial domicil of the parties.

protect the resident spouse at the expense of uniformity. However, with the decision in the first *Williams* case, the Court eliminated any requirement for a divorce to be entitled to full faith and credit, aside from procedural due process and the necessity for one of the spouses to be domiciled in the forum state. Even before the decision in the *Haddock* case, the Court had stated that in order to have jurisdiction in a divorce suit, one of the parties had to be domiciled in that state.[9] The first *Williams* case decided that domicil of one of the parties alone, without more, was sufficient to entitle a decree to full faith and credit. No longer was it necessary to locate the matrimonial domicil or determine which party was at fault, and the *Haddock* case was specifically overruled.[10]

But Mr. Williams and Mrs. Hendrix's story did not end with the decision in the first *Williams* case. After the decision, the parties were again tried for bigamous cohabitation. This time the North Carolina courts found the defendants were not domiciled in Nevada at the time the divorce decrees were rendered. Therefore, the North Carolina courts found that the Nevada court lacked jurisdiction of the subject matter to render the decrees, and as a result, the divorces were not entitled to full faith and credit. The defendants appealed to the Supreme Court of the United States, but this time the court affirmed the conviction.[11] Whether it was under a due process theory or an exception to the full faith and credit requirement, the court held that North Carolina could inquire into the jurisdiction of the Nevada court to render the judgment, and in divorce cases domicil of one of the parties is essential to jurisdiction. Mr. Justice Frankfurter, speaking for the majority, stated:

> [T]he decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.[12]

Thus the decision in the second *Williams* case represents a step backward from the first *Williams* case, and once again raises uncertainty as to the validity of migratory divorces. Nevertheless, the court somewhat limited the uncertainty when it held that the burden

9 Bell v. Bell, 181 U.S. 175 (1901); Streitwolf v. Strietwolf, 181 U.S. 179 (1901).

10 Williams v. North Carolina, 317 U.S. 287, 293 (1942).

11 Williams v. North Carolina, 325 U.S. 226 (1945) [hereinafter referred to in text as the second Williams case].

12 325 U.S. 226, 232.

of proof in attacking the finding of domicil rests upon the party attacking the validity of the divorce.[13]

The decisions in both the first and second *Williams* cases begin with the assumption that domicil of one of the parties is necessary in order for a state to render a decree of divorce.[14] The requirement of domicil of one of the parties to establish jurisdiction is a product of the idea that a divorce proceeding is in the nature of an action in rem.[15] The marital relationship is the res and follows the domicil of the parties. Thus the res can be located in two different places if the parties have separated and have established domicils independent of each other. Since the domicil of one of the parties in the forum state provided the res, the court may proceed to dissolve the marital relationship without in personam jurisdiction over an absent spouse. The characterization of a divorce proceeding as an action in rem eliminates much of the hardship that would necessarily result if the court were required to have personal jurisdiction over the defendant in order to render a valid decree. Obviously, the state has an interest in dissolving the marital status of one of its residents when the absent spouse has left the jurisdiction to whereabouts unknown. It would be an extreme hardship in many cases to saddle a spouse forever with the marriage relationship simply because the absent spouse had left the state and to require the resident spouse to journey to another state where the spouse can be personally served in order to terminate the marriage.

The problem, of course, is that in selecting domicil as the nexus

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13 325 U.S. 226, 233-234. The Court said: "The fact that the Nevada court found that they were domiciled there is entitled respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant."

14 Williams v. North Carolina, 317 U.S. 287 (1942). Mr. Justice Douglas, speaking for the majority said:

> Domicil of the plaintiff . . . is recognized in the *Haddock* case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction . . . . 317 U.S. 287, 297.

In the second Williams case, Mr. Justice Frankfurter said:

> Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. [Citations omitted.] The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. 325 U.S. 226, 229-30.

15 Williams v. North Carolina, 317 U.S. 287, 297 (1942).

between the state and the res, one has selected a nexus that is subjective and dependent upon factors that are susceptible of various interpretations. Domicil is dependent upon residence in the state coupled with an intent to remain in the state indefinitely or permanently.[16] A person, therefore, is incapable, at least theoretically, of having two domicils at the same time.

Many state statutes do not speak in terms of domicil as a requirement for divorce jurisdiction, but instead require that the plaintiff have a residence in the state for a certain length of time.[17] However, these statutes have been interpreted to include the requirement of domicil; thus they involve, in addition to actual physical presence in the state for a certain period, an intent to remain in the state indefinitely.[18]

Since domicil is, at least in part, dependent on the intent of the person involved, it is possible that different courts could make different findings as to that intent, both decisions being supported by the evidence. The second *Williams* case, by holding that a second state may always inquire into the jurisdictional finding of the first state, has opened the door for conflicting findings on the issue of domicil, and thus, has left open the possibility that a person might be legally divorced in one state and legally married in another state. The Supreme Court evidently was aware of the problem raised by its decision in the second *Williams* case, since it held:

> Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of of different states as to the place of domicil, where the exercise of state power is dependent upon domicil within its boundaries.[19]

The long awaited confrontation between the states came in 1962 in the case of *Colby v. Colby*.[20] Husband and wife were both domiciliaries of Maryland. The wife traveled to Nevada where, after residing for the necessary period, she obtained an *ex parte* divorce.[21] Two years later, the husband brought an action in Maryland and was awarded a separation, both parties being before the

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16 *E.g.*, Gage v. Gage, 89 F. Supp. 987 (D.D.C. 1950); Campbell v. Campbell, 57 So. 2d 34 (Fla. 1952); 36 A.L.R.2d 741 (1954).

17 *E.g.*, OHIO REV. CODE. ANN. § 3105.03 (Page Supp. 1967).

18 *E.g.* Saalfeld v. Saalfeld, 86 Ohio App. 225, 89 N.E.2d 165 (1949); Glassman v. Glassman, 75 Ohio App. 47, 60 N.E.2d 716 (1944).

19 325 U.S. 226, 231 (1945).

20 369 P.2d 1019 (Nev. 1962), *cert. denied*, 371 U.S. 888 (1962).

21 *Id.* at 1020.

court. The defendant wife contended that her Nevada divorce was a complete defense to her ex-husband's action. The Maryland Court of Appeals affirmed the trial court's holding that, contrary to the recital in the Nevada decree, the wife was never domiciled in the state, the Nevada court was without jurisdiction, and its decision was not entitled to full faith and credit in Maryland.[22] The husband then went to Nevada and brought an action to vacate the former decree of divorce, claiming that the Maryland decree was entitled to full faith and credit in Nevada.[23] The trial court rendered summary judgment for the husband, but the Nevada Supreme Court reversed, holding that an *ex parte* decree is final within the state and full faith and credit does not require a state granting a divorce to accept another state's determination that it was without jurisdiction. The Supreme Court of the United States denied certiorari,[24] and thus, left the parties in the awkward position of having their marital status depend upon state lines.

The husband based his Nevada action on the Supreme Court's holding in the case of *Sutton v. Leib*.[25] In that case the plaintiff had secured a divorce in Illinois with provisions for alimony until remarriage. Soon thereafter, she remarried in Nevada a person who had obtained an *ex parte* divorce from his wife in that state. The former wife of the plaintiff's new husband brought suit in New York attacking the Nevada decree. She obtained a judgment that the Nevada decree was void. The plaintiff then brought suit in New York to have her second marriage annulled. After the New York court granted her annulment, she returned to Illinois and sued her first husband for back alimony payments, claiming that the New York decree determined that she had never been remarried. The court of appeals held that the divorce and remarriage were still valid in Nevada despite the New York court's decision and therefore, the defendant's alimony was discharged.[26] On appeal, the United States Supreme Court held that Illinois was required to give full faith and credit to the judgment of the New York court and the decree was conclusive as to the marital status of the parties in all states, including Nevada.[27]

Thus in the *Colby* case the husband's contention was that the

22 Colby v. Colby, 217 Md. 35, 141 A.2d 506 (1958), *cert. denied*, 358 U.S. 838 (1958).
23 Colby v. Colby, 369 P.2d 1019, 1022 (Nev. 1962).
24 371 U.S. 888 (1962).
25 342 U.S. 402 (1952).
26 188 F.2d 766 (7th Cir. 1951).
27 Sutton v. Leib, 342 U.S. 402, 408 (1952).

Maryland decree rendered with both parties personally before the court was entitled to full faith and credit in Nevada on the basis of the holding in *Sutton v. Leib*.[28] The Nevada court, however, distinguished the *Sutton* case, on the grounds that in that case the wife had never had her marital status before the Nevada courts and that the Supreme Court's statement in the *Sutton* case that Nevada would have to grant full faith and credit to the New York decree was dictum and not controlling.[29]

III. The Sherrer and Coe Cases

In 1948 the Supreme Court limited the effect of its holding in the second *Williams* case and held that full faith and credit bars a litigant, who has appeared in an action and had full opportunity to litigate the jurisdictional issues, from collaterally attacking the decision in another state when the decision is not susceptible of collateral attack in the state where it was rendered.[30] In the *Sherrer* case, the parties were both domiciliaries of Massachusetts. The wife left for Florida in April, 1944, and in July, 1944, filed for divorce in that state, alleging that she was a "bona fide legal resident of the State of Florida."[31] The husband received notice of the proceeding by mail and retained a Florida counsel who entered a general appearance for him denying the allegations in the petition, including the allegations as to the petitioner's residence. At the hearing, the husband appeared personally and testified. The wife introduced evidence to establish her Florida residence, and counsel for the husband failed to cross examine on that issue or introduce evidence in rebuttal. The wife was granted a divorce with the decree specifically finding the wife "a bona fide resident of the State of Florida, and that this court has jurisdiction of the parties and the subject matter in said cause . . . ."[32] The husband did not appeal the decree. Immediately thereafter, the wife remarried and returned to Massachusetts in February, 1945. In June, 1945, the former husband instituted an action in Massachusetts to have the Florida divorce decree declared void and to have the wife's remarriage declared void. The wife offered the Florida decree as a defense, but the court found that she was never domiciled in Florida and granted the relief prayed for by the plaintiff. The Massachusetts Supreme Court affirmed on the

28 342 U.S. 402 (1952).

29 369 P.2d 1019, 1021 (Nev. 1962).

30 Sherrer v. Sherrer, 334 U.S. 343 (1948).

31 *Id.* at 345.

32 *Id.* at 346.

ground that the full faith and credit clause did not preclude the trial court from re-examining the finding of domicil made by the Florida court.[33] The Supreme Court of the United States reversed, holding that even though the defendant in the divorce action had not actually litigated the issue of jurisdiction, the decree was res judicata as to him in Florida, and therefore, could not be collaterally attacked in another state.[34]

In *Coe v. Coe*, the companion case to *Sherrer*,[35] the Supreme Court held that where the defendant personally appears and admits the allegations as to residence, the same principles apply.[36] The *Sherrer* and *Coe* cases are an extension of the earlier Supreme Court case of *Davis v. Davis*,[37] where it was held that a former decree of divorce, based upon a finding of domicil after an actual contest and litigation of that issue, is entitled to full faith and credit in another jurisdiction and is not vulnerable to collateral attack. The holding in *Sherrer* was based upon the idea that a person should have only one opportunity to litigate an issue, and if he waives that right, he will be forever forclosed from contesting the issue at a later time. Actual litigation of the issue is not necessary; the person need only have an opportunity to contest.

The Supreme Court expanded the holding of *Sherrer* in 1951, in the case of *Cook v. Cook*.[38] In that case, the Vermont Supreme Court affirmed an annulment of a marriage on the ground that the defendant was still married, even though the defendant had obtained a Florida divorce.[39] The Vermont court held that the Florida court's findings showed neither an appearance by the defendant spouse nor personal service made upon him and that therefore, the Vermont courts could relitigate the issue of domicil and find that the defendant was not domiciled in Florida at the time the decree was rendered. The Supreme Court of the United States reversed, holding that the party assailing the Florida decree had not met the burden of proof

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33 Sherrer v. Sherrer, 320 Mass. 351, 69 N.E.2d 801 (1946).

34 Sherrer v. Sherrer, 334 U.S. 343, 356 (1948).

35 334 U.S. 378 (1948).

36 Here, as in the *Sherrer* case, the decree of divorce was one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues. It was a decree not susceptible to collateral attack in the courts of the state in which it was rendered.

37 305 U.S. 32 (1938).

38 342 U.S. 126 (1951).

39 Cook v. Cook, 116 Vt. 374, 76 A.2d 593 (1950).

arising from the presumption of jurisdiction and that the Vermont court must make an actual finding on the issue as to whether the absent spouse personally appeared or was personally served in Florida. The Court went on to hold that the Vermont court could not rely merely on a statement that the Florida record showed no service or appearance by the spouse in the Florida proceeding.

The *Sherrer* case precluded the spouse, who personally appeared in the divorce proceedings, from relitigating the issue of domicil, if barred by the law of the divorcing state. Later this rule was extended by the Supreme Court to preclude attack by one not in privity with the spouses. In *Johnson v. Muelberger*,[40] the court held that when the law of the divorcing state prevents a child from attacking a divorce decree which the parent could not attack, that child cannot collaterally attack the decree in another state consistently with the principle of full faith and credit.

The question immediately arises as to what constitutes an appearance in the divorce proceeding. Clearly, an actual litigation of the domicil issue will prevent collateral attack.[41] It also appears clear that when the defendant is personally served within the jurisdiction, but makes no appearance, the decree is nonetheless entitled to full faith and credit.[42] The Supreme Court has yet to decide a case where the defendant entered an appearance in the proceeding without any participation, but a broad reading of the *Sherrer* case would indicate that the critical question to be decided is whether there was *opportunity* to litigate, and any authorized appearance will prevent subsequent attack.

The holding in the *Sherrer* case also raises the very real possibility of collusion on the part of the spouses to obtain a divorce forever binding in all states. Parties residing in a state with limited grounds for divorce can travel to a state with more liberal grounds and if the court does not question the issue of domicil, obtain a divorce that should be binding on everyone. It should be clear that a party who appeared in the proceeding or was personally served within the jurisdiction of the state rendering the divorce decree cannot avoid the rule of *Sherrer* by simply alleging fraud by the other party in establishing the requirement of domicil. Otherwise,

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40 340 U.S. 581 (1951).

41 *E.g.*, Davis v. Davis, 305 U.S. 32 (1938); Keller v. Keller, 212 S.W.2d 789 (Mo. 1948).

42 Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951); *In re* Wynne's Estate, 194 Misc. 459, 85 N.Y.S.2d 743 (1948).

the holding in *Sherrer* would be of no value, since a party could always allege fraud.[43] However, the courts of at least one state have held that *Sherrer* does not prevent subsequent collateral attack on the issue of domicil even though both parties were before the court when it is shown that there was active fraud on the part of both parties in obtaining the divorce.[44] In *Staedler v. Staedler*[45] the parties entered into a separation agreement which contained, among other items, an agreement by the wife to enter an appearance in any divorce proceeding instituted by the husband. Also, the agreement specified that if the wife opposed the divorce, the property settlement would be void. The husband left the state and filed for divorce in Florida. Before instituting the action, the husband sent to the wife in New Jersey an authorization for her to sign, agreeing to hire a Florida attorney to represent her in the action. She signed the authorization and returned it to her husband. The Florida attorney filed an answer for the wife and admitted, among other things, the husband's allegations as to residence in Florida. The Florida court rendered a decree of divorce in favor of the husband. The husband returned to New Jersey and subsequently defaulted on the terms of the original separation agreement. The wife instituted a suit in New Jersey to have the Florida decree set aside and to grant a divorce in her favor. The trial court found that the husband never intended and did not establish a bona fide domicil in Florida and therefore that decree was void. The court proceeded to grant a divorce to the wife. The trial judge held that the *Sherrer* case did not require that a decree be given full faith and credit where the plaintiff acknowledged that it was obtained by fraud. The decision went on to hold that Florida had no interest which would be infringed by a refusal to recognize a decree obtained by fraud by persons not domiciliaries of Florida. The Supreme Court of New Jersey affirmed, stating:

> We have carefully considered these cases [*Sherrer* and *Coe*] and we do not believe that the full faith and credit clause of the Federal Constitution was ever intended to be used as a shield for or to give validity to the type of contract here under consideration or to approve the acts performed pursuant thereto in

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43 Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385 (1949).

44 Staedler v. Staedler, 6 N.J. 380, 78 A.2d 896 (1951); Chirelstein v. Chirelstein, 8 N.J. Super. 504, 73 A.2d 680 (1950), *modified on other grounds*, 12 N.J. Super. 468, 79 A.2d 884 (1951).

45 6 N.J. 380, 78 A.2d 896 (1951).

> cases where the ultimate purpose was to commit a fraud upon the jurisdiction of a court of one of the several sovereign states.[46]

It is interesting to note that the New Jersey court did not even consider the question of the decree's validity in Florida against a collateral attack on the same grounds, even though the *Sherrer* case rested in part of the principle of res judicata in the state rendering the decree.

In *Donnell v. Howell*[47] the North Carolina Supreme Court was faced with a similar set of circumstances involving an Alabama divorce. The decision declared the divorce void despite the fact that the plaintiff had admitted in the divorce proceeding that his wife had been an Alabama resident for the requisite length of time. The North Carolina court discussed the validity of the decree in Alabama and concluded that the Alabama courts would also declare the decree void under the same facts and therefore, since the parties were not precluded from attacking the decree in Alabama by principles of res judicata, the North Carolina courts could declare the decree void.[48] One of the cases relied on by the North Carolina court in reaching that conclusion was a case in which the Alabama Supreme Court said the principle of res judicata was applicable to the jurisdictional findings but that the parties had waived that objection by failing to raise it.[49]

The District of Columbia judiciary have fallen into the same trap as did the North Carolina court. In *Gherardi de Parata v. Gherardi de Parata*[50] both spouses were domiciled in the District of Columbia. The defendant procured the wife's signature on a piece of paper entitled "Acceptance of Service of Process and Answer and Waiver of Respondent," with the waiver also stating the husband was a bona fide resident of Alabama. The husband went to Alabama for five hours during which period he instituted proceedings for divorce. The Alabama court granted the divorce and later the wife instituted an action in the Municipal Court of the District of Columbia to affirm the marriage and declare void the Alabama divorce which was procured by fraud on the issue of jurisdiction. The husband defended on the ground that since both parties had participated in the Alabama proceedings, the decree was entitled to

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46 *Id.* at 391, 78 A.2d at 901.

47 257 N.C. 175, 125 S.E.2d 448 (1962).

48 *Id.* at 187, 125 S.E.2d at 454.

49 Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961).

50 179 A.2d 723 (D.C. Mun. App. 1962).

full faith and credit. The trial court held for the husband, finding that the wife had authorized an Alabama attorney to file the waiver of service of process and therefore, the decree was res judicata as to the issues. The Municipal Court of Appeals reversed, holding that the wife had not sufficently participated in the action to confer jurisdiction on the Alabama courts, and also, since Alabama courts would have re-examined the jurisdictional question and since full faith and credit requires that only the same effect be given a judgment rendered in another state as that state itself would give, the courts of the District of Columbia would likewise re-examine the jurisdictional findings.

Therefore, assuming Alabama courts would have applied the principle of res judicata, if raised by one of the parties,[51] the decision of the District of Columbia court clearly violates the full faith and credit requirement as enunciated in the *Sherrer* case.

These cases clearly show that the ramifications of the *Sherrer* decision are as uncertain as the decisions in the two *Williams* cases. Yet to be resolved are the questions of what is sufficent to constitute an appearance so as to afford an opportunity to litigate the jurisdictional issue; what is the effect of collusion by both parties in obtaining the divorce; and what is sufficent participation by one party as to amount to active fraud in obtaining the decree. Does the mere signing of a waiver of service of process amount to sufficient participation as to invoke the *Sherrer* rule? If not, does authorization of an attorney to enter an appearance and admit the allegations of the petition constitute fraud on the part of both parties and enable a subsequent collateral attack in another jurisdiction as was allowed in the *Staedler* case? At least one author has suggested that the *Sherrer* decision and the subsequent cases expanding *Sherrer* should be overruled, since to forbid a collateral attack on a foreign divorce uses the full faith and credit clause to destroy its own principle that each state is entitled to manage its own affairs.[52]

It is submitted that the weakness and uncertainty caused by the *Sherrer* decision are a result of the insistence on the part of the Supreme Court to keep domicil of one of the parties as a necessary factor in order to establish a jurisdictional foundation. The uncertainty of the finding of domicil necessarily opens up a possibility of a different finding on that issue on collateral attack, and in order

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51 *Id.*

52 Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax,* 34 U. CHIC. L. REV. 26, 56 (1966).

to establish some finality to divorce decrees, the *Sherrer* decision is a necessary evil.

IV. ALTERNATIVES

As pointed out above, the beginning point of all the Supreme Court's holdings in this area has been that domicil of one of the parties establishes the jurisdictional basis upon which a state can dissolve the marital status. There are alternatives to domicil, such as physical presence or residence which would provide the jurisdictional foundation required by the due process clause and also eliminate the uncertainty surrounding the use of domicil. The alternatives would create a basis to support the interest of the state in protecting its residents against migratory *ex parte* divorces and yet provide a degree of certainty to divorces, a vital necessity in an area involving the legitimacy of children and the devolution of estates. Even if the Supreme Court maintains its position that domicil is a constitutional requirement, there exists an alternative in the form advanced by the Uniform Divorce Recognition Act.[53]

A. *The Uniform Divorce Recognition Act*

The Uniform Act was adopted by the National Conference of Commissioners on Uniform Laws and the American Bar Association in 1948, not to do away with domicil as a jurisdictional requirement but to discourage the migratory divorce.[54] Thus far, the act has been adopted in only ten states.[55] The provisions of the act are as follows:

> § 1. A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceedings for the divorce was commenced.
> § 2. Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceedings therefore, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintains a place of residence within the state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

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53 9A U.L.A. 462 (1957).

54 Note, 16 HASTINGS L.J. 121, 123 (1964).

55 California, Louisiana, Montana, Nebraska, New Hampshire, New York, North Dakota, Rhode Island, South Carolina, Washington, and Wisconsin. The provision has since been repealed in Louisiana. *Id.* at 124.

The effect of the first section is to recognize the rule that in order for a state to terminate the marital status, one of the parties must be domiciled within its borders. Section two of the act was designed to add an element of certainty to the finding of domicil, and to change the burden of proof if certain residence requirements are not met and to make the divorce prima facie invalid. Whether the later section conflicts with the holdings of the Supreme Court in the second *Williams* case and subsequent cases would not seem to be open to doubt. Consider the following language taken from the second *Williams* case: "The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant."[56]

The act was most recently adopted in New York and has been critized as raising serious due process problems, since a statutory presumption must have a rational connection between the fact proved and the ultimate fact presumed—in this case, lack of domicil.[57] The usual interpretation of the meaning of domicil has been that a person can establish a new domicil overnight, if he has the proper intent.[58]

The Uniform Divorce Recognition Act does not solve all of the problems raised by the *Williams* cases and is subject to constitutional attack. The effect of the law in at least one jurisdiction has been minimal.[59] But the act does attempt to reduce the uncertainty caused by the use of domicil as providing the jurisdictional basis for divorce. If applied by the courts, it would allow the parties to assess their position before fleeing to another jurisdiction to obtain a divorce.

B. *Elimination of the Domicil Requirement*

By far the most useful solution to the problems of uncertainty would be the complete elimination of domicil as the basis for divorce jurisdiction. The Supreme Court, although expressly holding many times that the state of domicil has exclusive power to terminate the marital status,[60] has yet to face squarely a case in which the state law has not required domicil of one of the parties in order to grant a divorce. However, it would seem to be a fairly safe assumption, at least at the time of the first *Williams* case, that the Supreme Court

56 325 U.S. 226, 233-34.

57 Note, 67 COL. L. REV. 1320 (1967); Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954).

58 24 AM. JUR. 2D, *Divorce and Separation*, § 248 (1966).

59 Note, 16 HASTINGS L.J. 121 (1964).

60 *E.g.*, Williams v. North Carolina, 325 U.S. 226, 229 (1945).

was using domicil in the constitutional sense as providing the jurisdictional basis to satisfy the due process clause and holding that full faith and credit requires recognition of decrees meeting these jurisdictional due process requirements. Nevertheless, it is still hard to interpret the Constitution as requiring domicil rather than some other factor as the nexus to give a state power to dissolve a marriage. Factors such as physical presence, residence, location of the celebration of the marriage, and location of the place where the matrimonial offense occurred might be used to provide the nexus.

The use of physical presence as providing the nexus would have the advantage of certainty that is lacking with the use of domicil, and a collateral attack on physical presence would be next to impossible. It has been suggested by one author that the use of physical presence as a basis for jurisdiction can be equated with the situation involving the situs of a debt where it was once held that the situs of a debt was the domicil of the debtor, but now is considered, for purposes of garnishment, to be where the debtor may be found.[61]

Mere residence in the jurisdiction might also be used as the necessary nexus between the state and the marital status and like physical presence, would eliminate the necessity of inquiring into the plaintiff's mental status to establish the jurisdiction. The states have an interest in the persons residing within their borders without regard to their state of mind and often, especially in resort areas, a person will reside in that state for a longer period of time during the year than in his state of domicil.

The state where the marriage was celebrated also might have sufficient interest in the marital status to provide a basis for assertion of jurisdiction to terminate the marriage. It is firmly established that the validity of a marriage is to be decided by the law of the place where it was celebrated.[62] Why then should not that state also have a sufficient interest to terminate the marriage? However, as has been pointed out, the state of celebration is often a state where the parties have only minimal contacts; this might be insufficient to support jurisdiction.[63]

In tort law, the place where the alleged offense occurred generally

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61 Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 19 (1955).

62 H. GOODRICH, CONFLICT OF LAWS 228 (4th ed. Scoles 1964).

63 Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 15 (1955).

supplies the choice of law for purposes of conflict of laws, as well as providing the requisite interest to support jurisdiction of the subject matter.[64] Divorce law could be analogized to the tort situation, and thus the state wherein the matrimonial offense occurred would have sufficient interest to dissolve the marriage. But unlike physical presence, residence, and location of the state where the marriage was celebrated, the *locus delecti* is often hard to pinpoint and might prove as troublesome as the use of domicil.[65] Unlike the tort situation, the rule of reference and the rule of jurisdiction are the same in divorce cases almost without exception. Domicil provides both the basis for jurisdiction and the rule of reference as to what law will be applied. This situation has led many to believe that the whole problem of migratory divorces would be solved, not by revising the jurisdiction standards, but simply through a correct choice of law on the part of the forum state.[66] Judge Hastie, in his strong dissent in *Alton v. Alton*,[67] suggested that due process does not prevent the adjudication of a divorce action in any state when the court has personal jurisdiction over both parties and the only question for the court to decide is whether the substantive law of the forum can properly be applied.

The *Alton* case involved the constitutionality of a Virgin Islands statute which provided in divorce actions (1) that six weeks residence would be prima facie evidence of domicil and (2) that where the defendant was personally served within the jurisdiction or personally appeared in the proceedings, the court would have jurisdiction to grant the divorce without regard to domicil. The plaintiff in *Alton*, after residing in the Islands for six weeks, filed suit for divorce and the defendant entered a general appearance. The trial judge asked the plaintiff for further proof on the question of domicil. The plaintiff offered no further proof, and the action was dismissed. The court of appeals affirmed the trial court, holding that the statute violated the due process clause of the fifth amendment. The majority concluded that domicil was the basis for assertion of divorce jurisdiction; therefore, it would be a violation of due process for one state to alter the marital status between parties domiciled elsewhere.

64 H. GOODRICH, CONFLICT OF LAWS 165 (4th ed. Scoles 1964).

65 Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 21 (1955).

66 Alton v. Alton, 207 F.2d 667, 684 (3d Cir. 1953) (dissenting opinion); Currie, *Suitcase Divorces in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHIC. L. REV. 26, 48 (1966).

67 207 F.2d 667, 684 (3d Cir. 1953) (dissenting opinion).

The court also declared invalid the first part of the statute's presumption of domicil after six weeks, finding no reasonable relationship between the fact presumed and the fact creating the presumption. Judge Hastie disagreed with the majority in both instances, concluding that the domicil requirement was a judge-made rule without constitutional sanction, in addition to being a troublesome standard that often works unfairly and causes serious social problems.[68]

Unfortunately, by the time *Alton* reached the Supreme Court the parties had procured a divorce in their home state, and the Court dismissed the question as moot.[69] However, in a later case involving the same statute, the court of appeals again declared the statute unconstitutional on the basis of its decision in *Alton*,[70] and this time the Supreme Court heard the cases on the merits. In a five-three decision, it held the statute invalid but did not pass on the due process question. Instead, the Court said the statute went beyond the statutory authority delegated by Congress to the Virgin Islands Legislature in that it did not deal with a subject "of local application" but was designed to attract divorce seekers.[71] The Virgin Islands Legislature has since amended its law, and now the plaintiff must be domiciled therein and have resided in the Islands for at least six weeks prior to commencement of the action.[72]

A proper application of choice of law in the divorce field would eliminate many of the objections that supporters of the domiciliary requirement advance to perpetuate their beliefs. Jurisdiction based on personal service or personal appearance by the defendant, coupled with an appropriate choice of law, would serve to protect the interest of the state of matrimonial domicil. Thus in the *Alton* case if it appeared the parties were domiciled in Connecticut at the time of the action and the alleged misconduct took place in the matrimonial domicil state, then the Virgin Islands court, lacking connection with the subject matter of the action, would be forced to apply the divorce law of Connecticut.[73]

Another possible solution to the problem, closely allied to a proper choice of law, is the doctrine of forum non conveniens. A court, when called upon to exercise jurisdiction over the domestic problems of persons immigrating from distant states, would exercise

68 *Id.*

69 Alton v. Alton, 347 U.S. 610 (1954).

70 Granville-Smith v. Granville-Smith, 214 F.2d 820 (3d Cir. 1954).

71 Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955).

72 V.I. STAT. ANN. tit. 16, § 106.

73 Alton v. Alton, 207 F.2d 667, 684 (3d Cir. 1953) (dissenting opinion).

its discretion and decline or assume jurisdiction according to its assessment of whether the state has a legitimate concern in the marital status in question. But the Supreme Court has limited the use of the doctrine and has placed the burden on the defendant to establish a strong case for dismissal. Unless he so does, the plaintiff's choice of forum is not to be disturbed.[74] This doctrine has received little application in the field of divorce other than in the District of Columbia,[75] where the judiciary has applied the doctrine where it found that no property rights or other public interests were affected in the forum state,[76] when the crowded conditions of the court's docket required prime consideration be given parties who of necessity were forced to use local courts,[77] or when the court found that the defendant would be amenable to service of process in another jurisdiction where the action could have been prosecuted in a more expeditious manner.[78]

V. Conclusion

In the field of divorce law, it is very possible for a state to become overly concerned with the necessity of protecting its residents from migratory *ex parte* divorces procured by one of the spouses. The result of the overzealous concern is that while eliminating one evil, it has created a more serious problem that strikes at the foundation of familial relationships. Persons are legally married in one state, while they are as legally divorced in another. Children are legitimate in one state, yet illegitimate under the laws of another. Persons are legally married in one state, yet guilty of bigamous cohabitation in another. A marriage is annulled in one state yet solemnized forever in another state.

A solution to the problem will not be possible until one of two changes occur: (1) the Supreme Court eliminates completely the necessity of founding jurisdiction on a finding that one of the spouses is domiciled in state and substitutes in its place a relationship that

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74 Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Mr. Justice Jackson, speaking for the majority said:

> In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

Id. at 506-507.

75 Annot., 9 A.L.R.3d 545 (1966).

76 Clark v. Clark, 144 A.2d 919 (D.C. Mun. App. 1958).

77 Gill v. Gill, 193 F.2d 34 (D.C. Cir. 1951).

78 Simons v. Simons, 187 F.2d 364 (D.C. Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

once shown is virtually impossible to impeach on collateral attack; or (2) the Supreme Court decides that once a judgment of one state has been successfully attacked in a sister state for lack of jurisdiction, the original judgment is void everywhere, including the state originally rendering the decree.

The first alternative presents the best possible solution, and many variations are possible, including a proper choice of law by the state rendering the decree. The statute of the Virgin Islands, declared unconstitutional in *Alton*, represents one variation that was attempted. The second alternative, while not eliminating the uncertainty involved in securing an *ex parte* migratory divorce, nonetheless would eliminate the difference in legal relationships which are possible under the present holding in the second *Williams* case.

The first move must be on the part of the state legislatures, for the Supreme Court can rule only if the question is presented. A superficial examination of the present status of interstate recognition of divorce decrees should satisfy state legislatures that the solution rests in their hands to protect their citizens from the over-protection they and the courts have been giving in the past.

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